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Wan Othman bin Wan Ismail v Malene CSB Insurance Brokers Sdn Bhd

HIGH COURT (KUALA LUMPUR) — NO D22–1041 OF 2001
AMELIA TEE ABDULLAH JC
21 DECEMBER 2009

Company and Corporations — Directors — Serving also as executive director, principal officer and chief executive officer — Whether entitled to monthly salary — Whether employee under contract of employment

Contract — Brokerage contract — Commission — Member of Business Advisory Council — Outstanding brokerage commission — Whether appointment valid — Whether brokerage contract established

The plaintiff, a former director and executive director of the defendant, claimed against the defendant herein for a salary amounting to £100,800 or its equivalent in Malaysian Ringgit together with brokerage commission amounting to USD17,708.06 and RM866,069.81. The defendant however, denied the plaintiff's claims above. The plaintiff claimed that he was involved with the establishment of defendant including securing a license from the Ministry of Finance to carry out the insurance business. Between 1987 and 1989, his duties were to turn the defendant around from a company operating at a loss to one that was profitable. He was in charge of business development and went out to look for clients. He was also in charge of the day to day running of the business. Notwithstanding the work that he was doing, he did not draw a salary but was only paid a director's fee. The plaintiff contended that apart from the 10% profit commission, he was also entitled to a salary of £4,200 per month from 1 January 1996 to 31 December 1997 amounting to £100,800. According to the plaintiff, at that point in time, he was an executive director, principal officer and the chief executive officer of the defendant and managed all its affairs. As the profits of 1996 to 1997 were far below that of the previous years, and consequently the profit commissions payable to him were also much lower, the defendant agreed to compensate the reduction of his profit commission by paying him a monthly salary. The plaintiff complained that the defendant did not pay him the salary as promised, hence the present suit. In respect of his claim for brokerage commission, the plaintiff contended that in accordance with the agreement that was reached at the 38th board of director's meeting, he was appointed as a member of the Council of Business Advisors ('CBA') vide a letter dated 5

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January 1998. The plaintiff testified that his role as CBA member was to promote the business of the defendant and to secure insurance business for the defendant through his influence, reputation and personal contacts and in return will be paid a commission of 30% of the defendant's brokerage fee. The defendant however, disputed his appointment as a member of the CBA.

Held, dismissing the plaintiff's claim with costs:

(1) If there was indeed an agreement to pay him £4,200 per month or any sum as remuneration or salary, such agreement was not officially reduced into writing and confirmed by the board of directors. In the absence of any board resolution to pay him the above monthly salary and in the absence of any evidence or at all that he was ever paid in English pounds, the court found that the plaintiff had failed to prove his claim for outstanding monthly salary (see para 55).

(2) Although the plaintiff's letter of appointment issued by Raihan and Phung was in written form setting out the arrangement for the sharing of brokerage fees, it was indeed unfortunate that the said arrangement was neither tabled nor confirmed by the defendant's board of directors as required by guideline 4(b) of the Insurance Brokers' Brokerage/Fee Sharing Guidelines (see para 62).

(3) Further, the fact that Raihan was at the material time only a broker, albeit the highest ranking executive, it was questionable whether she had the locus to sign the plaintiff's appointment letter. Even if she was of the view that she was the most appropriate person to sign the letter, she should have escalated it to the board of directors at the earliest opportunity for confirmation and ratification of her actions. Admittedly, she did not do so (see para 62).

[Bahasa Malaysia summary

Plaintif, bekas pengarah dan pengarah eksekutif kepada defendan, menuntut gaji berjumlah £100,800 atau jumlah yang bersamaan dengan Ringgit Malaysia beserta komisyen broker berjumlah USD17,708.06 dan RM866,069.81 terhadap defendan. Walau bagaimanapun, defendan menafikan tuntutan plaintif seperti di atas. Plaintif mendakwa bahawa dia terlibat dengan penubuhan defendan termasuk mendapatkan lesen daripada Kementerian Kewangan untuk menjalankan perniagaan insurans. Antara 1987 dan 1989, dia berkewajipan untuk mengubah defendan daripada syarikat yang mengalami kerugian kepada syarikat yang berkeuntungan. Dia bertanggungjawab dalam kemajuan perniagaan dan mencari klien-klien. Dia juga bertanggungjawab untuk menjalankan perniagaan. Namun di sebalik kerja-kerja yang dilakukannya, dia tidak dibayar gaji tetapi hanya dibayar

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bayaran pengarah. Plaintif menghujah bahawa selain daripada 10% komisyen keuntungan, dia juga berhak untuk gaji sebanyak £4,200 setiap bulan dari 1 Januari 1996 hingga 31 Disember 1997 berjumlah £100,800. Menurut plaintif, pada waktu itu, dia merupakan pengarah eksekutif, pegawai utama dan ketua pengarah eksekutif defendan dan menguruskan semua hal-ehwalnya. Memandangkan keuntungan 1996 hingga 1997 jauh lebih sedikit daripada tahun sebelumnya dan akibatnya komisyen keuntungan yang dibayar kepadanya juga lebih rendah, defendan bersetuju untuk membayar pengurangan komisyen keuntungannya dengan membayar gaji bulanan kepadanya. Plaintif mengadu bahawa defendan tidak membayar gaji kepadanya seperti yang dijanjikan, oleh itu guaman ini dijalankan. Berkenaan tuntutannya untuk komisyen broker, plaintif menghujah bahawa menurut perjanjian yang diputuskan di mesyuarat lembaga pengarah ke-38, dia dilantik sebagai ahli Lembaga Penasihat Perniagaan ('LPP') melalui surat bertarikh 5 Januari 1998. Plaintif memberi keterangan bahawa tugasnya sebagai ahli LPP ialah untuk mempromosikan perniagaan defendan dan mendapatkan perniagaan insurans bagi pihak defendan melalui pengaruh, reputasi dan kenalan-kenalan peribadinya dan sebagai balasan, dia akan dibayar komisyen 30% daripada bayaran broker defendan. Walau bagaimanapun, defendan mempertikaikan perlantikannya sebagai ahli LPP.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Sekiranya terdapat perjanjian untuk membayarnya £4,200 setiap bulan atau mana-mana jumlah sebagai gaji, perjanjian tersebut tidak dibuat dalam bentuk bertulis secara rasmi dan disahkan oleh lembaga pengarah. Dalam ketiadaan resolusi lembaga untuk membayarnya gaji seperti yang dinyatakan di atas dan keterangan dia pernah dibayar dalam paun Inggeris, mahkamah mendapati bahawa plaintif gagal untuk membuktikan tuntutannya untuk gaji bulanan yang belum dijelaskan (lihat perenggan 55).

(2) Walaupun surat perlantikan dikeluarkan oleh Raihan dan Phung dalam bentuk bertulis menyatakan aturan untuk perkongsian bayaran broker, malangnya aturan tersebut tidak pernah dikemukakan atau disahkan oleh lembaga pengarah defendan seperti yang diperlukan oleh garis panduan 4(b) Garis Panduan Perkongsian Brokeraj/ Yuran Broker (lihat perenggan 62).

(3) Selanjutnya, fakta bahawa Raihan pada masa matan hanya seorang broker, meskipun sebagai seorang eksekutif atasan, adalah dipersoalkan sama ada dia mempunyai lokus untuk menandatangani surat perlantikan plaintif. Walaupun dia berpendapat bahawa dia adalah orang yang paling sesuai untuk menandatangani surat tersebut, dia sepatutnya mengemukakannya kepada lembaga pengarah seawal

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mungkin untuk pengesahan dan ratifikasi tindakannya. Diakui, dia tidak berbuat demikian (lihat perenggan 62).]

Notes

For cases on commission, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2750–2751.

For cases on directors in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 153–355.

Legislation referred to

Exchange Control Act 1953

Richard Wee (HW Yip with him) (YH Teh & Quek) for the plaintiff.
Nad Segaran (Shearn Delamore & Co) for the defendant.

Amelia Tee Abdullah JC:

[1] The plaintiff, *Wan Othman bin Wan Ismail*, was a former director and executive director of the defendant, *Malene CSB Insurance Brokers Sdn Bhd*. The plaintiff's claim against the defendant is for salary amounting to £100,800 or its equivalent in Malaysian Ringgit together with brokerage commission amounting to USD17,708.06 and RM866,069.81.

[2] The defendant has denied the plaintiff's claims. It denies that there was an agreement to pay the plaintiff a salary. In the alternative it pleads that any agreement to pay a monthly salary, which was denied, was contrary to the provisions of the Exchange Control Act 1953. It denies that the plaintiff was appointed as a member of council of business advisors. In the alternative, it pleads that even if the plaintiff was so appointed (which was denied), the appointment was contrary to Bank Negara's Insurance Brokers' brokerage/Fee sharing guidelines and the plaintiff was thus not entitled to receive the said commission.

[3] The defendant, which was initially incorporated as Yuen Tah Traders Sdn Bhd on 19 November 1980, changed its name to Malene Insurance Brokers Sdn Bhd on 31 January 1981. On 26 September 1985, its name was changed to Malene CSB Insurance Brokers Sdn Bhd after Cayzer Steel Bowater International Ltd became a shareholder with 30% shares. Cayzer Steel Bowater International Ltd was subsequently renamed Morgan, Read & Sharman Ltd. It is an agreed fact that the plaintiff, Wan Othman bin Wan Ismail, was appointed as director of the defendant since 1 April 1985 and as executive director since 1 April 1986.

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A **[4]** The plaintiff testified that he was involved with the defendant even before its incorporation. He was involved in applying for and obtaining a license from the Ministry of Finance to carry out an insurance business. Although the defendant had other directors, he was the only person involved in the setting up of the defendant's operations as he was the only one with **B** experience in the insurance business. The court accepts the plaintiff's evidence in this regard as his contributions to the defendant during the initial stage of the setting up of the defendant are documented in the board minutes. In fact, the minutes of the seventh board of directors' meeting held on 20 March 1985 recorded that the board had agreed that the plaintiff was 'to be **C** paid an allowance during the initial period of the setting up of the Kuala Lumpur office'.

[5] In 1985, the defendant had a technical advisor who was to run the company. According to the plaintiff, the technical advisor's services were **D** terminated when the defendant realised that he was too expensive and thereafter he took over the running of the defendant. The court notes that the minutes of the 12th board of directors' meeting referred to by the plaintiff in support of this evidence only records the departure of the technical advisor and not the plaintiff's taking over of the technical advisor's duties.

E

[6] It is the plaintiff's case that between 1987 and 1989, his duties were to turn the defendant around from a company operating at a loss to one that was profitable. He was in charge of business development and went out to look for clients. He was also in charge of the day to day running of the business. **F** Notwithstanding the work that he was doing, he did not draw a salary but was only paid a director's fee. His explanation was that this was because between 1987 and 1989, the defendant did not have much cash as profits were used to pay off debts of previous years. Further, as his role was to increase the business, he worked without a salary so that he could build up **G** the company and make it profitable as quickly as possible.

[7] It is the plaintiff's evidence that between the years 1990 and 1991, the cash flow of the defendant improved so much that there were profits for **H** distribution. In answer 18 of his witness statement, he states that:

> ... it was agreed between the Defendant and I that I be paid a profit commission of 10% of the Defendant's pre-tax profit up to an annual maximum of RM150,000.00 a year.

I The decision to pay him profit commission was conveyed to him vide a letter on 26 February 1992 (p 1 of AB1) and was possibly made during the 17th Board meeting held the previous day.

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[8] He was paid 10% of the pre-tax profit for the years 1990 and 1991. For the years 1992 and 1993, the maximum payable was increased to RM250,000 per month because of increased profits. In 1992 and 1993, he was paid approximately RM190,000 per year and in 1994 and 1995, he received the maximum of RM250,000 for each year.

[9] The plaintiff was not paid profit commission for the years 1996 and 1997. The pre-tax profit for 1996 was RM441,282 whilst for 1997 it was RM1,637,896. As such, the profit commission due to him for 1996 would be RM44,138.20 and for 1997 it would be RM163,789.60 thus making a total of RM207,927.80 for the two years.

[10] In respect of profit commission, the defendant does not deny that there was an agreement to pay commissions. The court accepts that profit commission for the years 1996 and 1997 is no longer an issue between the parties following the payment of RM200,000 vide two cheques for RM50,000 and RM150,000, both dated 13 January 1999.

[11] The plaintiff contends that apart from the 10% profit commission, he was also entitled to a salary of £4,200 per month from 1 January 1996 to 31 December 1997 amounting to £100,800. What is the basis of this claim in light of the fact that he was already receiving a 10% profit commission?

[12] The plaintiff explained that at that point in time, he was an executive director, principal officer and chief executive officer of the defendant and managing all its affairs. At the board of director's level, he was referred to as the executive director who ran the business of the defendant. In the eyes of Bank Negara and the world at large, he was the principal officer because he was managing the affairs of the defendant. He was also known as the chief executive officer because he was responsible for the operations and administration of the defendant. The plaintiff testified that he was both a director as well as an employee. As a director, he is paid director's fee which is but a small amount. But because he worked in the defendant, he would also be paid a salary. However, he could not recall if he was ever given a letter of employment as an employee. He confirmed that article 64 of the memorandum of association of Yuen Tah Traders Sdn Bhd, the old name for the defendant, provides that the remuneration of the directors shall be determined by the company in general meeting. He claimed that his remuneration was decided by the board members in 1997 but not during a board meeting. As such, there were no minutes of the determination.

[13] According to the plaintiff, the profits of 1996 to 1997 were far below that of the previous years, and consequently the profit commissions payable

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to him were also much lower. It was because of this that the defendant agreed to compensate the reduction of his profit commission by paying him a monthly salary.

[14] The plaintiff complained that the defendant did not pay him the salary of a principal officer as promised, hence the present suit. During cross-examination, he explained that there 'a discussion by members of the board *outside the board meeting* and they agreed to pay' him a salary for 1996 and 1997. The board members who decided were Frank McCarthy, Roger Sharman, Abang Noordin and Tunku Zuhri. This agreement was not minuted. However, he agreed that they did not tell him that he would be paid £4,200 per month. He claimed that the agreement to pay him £4,200 per month is reflected in a letter dated 5 January 1998 signed by both FJ McCarthy and RJ Sharman, managing director and director of Morgan, Read & Sharman Ltd respectively which allegedly confirms that the salary payable for 1996 and 1997 is £4,200 per month. On cross-examination, he agreed that the above letter was merely a suggestion from McCarty and Sharman for a remuneration of £4,200 per month.

[15] According to the plaintiff, he repeatedly asked for his salary until the matter was formally raised during the 38th board of directors' meeting held on 28 October 1997. The minutes of the said meeting will reflect that the plaintiff had 'requested the board to resolve on his remuneration by 31 December 1997. If the matter was not resolved by the said date, the board agreed to his request that he be reverted to the appointment of advisor in the business advisory council'. As the plaintiff's remuneration was not resolved by the due date, the defendant sent a letter dated 31 December 1997 to the board of directors to inform that he would cease to assume the positions of executive director/principal officer/chief executive officer with effect from the date of the letter.

[16] In respect of his claim for brokerage commission, the plaintiff testified that in accordance with the agreement that was reached at the 38th board of director's meeting, he was appointed as a CBA member vide a letter dated 5 January 1998 (p 62 of AB1). The court notes that this letter was signed by Raihan Abdul Rahman and Phung Yoke Boo, whose designations on the said letter was stated as 'broker'. The claimant testified that his appointment as CBA member was informed to Bank Negara as well as the directors and shareholder of the defendant.

[17] The plaintiff testified that his role as CBA member or member of the council of business advisors was to promote the business of the defendant and to secure insurance business for the defendant through his influence,

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reputation and personal contacts. It is the plaintiff's evidence that in return for his services, the defendant agreed to pay him 30% of the brokerage fees.

[18] The plaintiff agreed that the insurance industry is heavily regulated by Bank Negara through rules and guidelines. Reference was made to the insurance brokers' brokerage/fee sharing guidelines and item 5(b) which provides that the broker's own employees, including directors, shall not qualify as a broker's business introducer unless the agreement on brokerage sharing forms part and parcel of the remuneration package of such employee or director and was duly approved by the board of directors.

[19] The plaintiff testified that he secured the renewals and purchase of insurance policies from Esso Production Malaysia Inc ('EPMI') and MHS Aviation Sdn Bhd ('MHS') for the period beginning 1998. He referred to:

(a) a letter signed by Raihan Abdul Rahman, the acting CEO of the defendant, dated 14 March 1998 (P3) where Raihan had, inter alia, informed Morgan, Read & Sharman that the EPMI policies were successfully negotiated by the plaintiff; and

(b) a long memo dated 23 March 1998 from Raihan Abdul Rahman to Adam Ali Ibrahim (P2) to argue a case for the immediate payment of brokerage commission and acknowledging the plaintiff for his role in securing the EPMI and MHS accounts.

[20] According to the plaintiff, the agreed introducer or brokerage fee promised to him was 30% of the defendant's brokerage fee. 30% is the common percentage of brokerage fees in the insurance industry. The percentage of premium to be paid to the broker is normally 15% of the premium where the CBA is paid 30% of the 15%. The defendant's brokerage fee for the EPMI policies was RM694,000 and 30% of that would be RM208,200 per year for four years (three years + one year extension) totaling RM832,800. The plaintiff also testified that a sum of RM33,269.81 as well as USD17,708.06 was due to him as brokerage commission for specified MHS policies as set out in his answer 44. The plaintiff pointed out that although the commission for these policies were not paid to him, he was paid RM16,616.06 on 17 April 1998 for his share of 30% brokerage commission on MHS's general classes of insurance (pp 18 & 19 of AB3). The plaintiff pointed out that both the specified MHS policies as well as the MHS general classes policy were taken out in 1998 and he queried why he should be paid for one and not the other.

[21] During cross-examination, the plaintiff admitted that ESSO had been with the defendant for four to five years prior to Raihan's letter appointing him as a member of the council of business advisors. However, MHS was a

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new client. He confirmed that p 53 of AB1 was a letter from MHS appointing the defendant as the placement broker for all MHS insurance with effect from 1 January 1998. The letter was dated 9 December 1997 when the plaintiff was still a director of the defendant. The defendant was referred to EPMI's letter dated 16 September 1997 confirming their renewal of insurance policies for 1998–2000 (pp 59–60 of AB1) and he confirmed that he was still a director of the defendant when the said letter was written. Notwithstanding his answer above, the plaintiff nevertheless maintained that he was still entitled to brokerage commission in respect of the EPMI contract based on Raihan and Phung's letter at pp 62–63 of AB1.

[22] The plaintiff also relied on the cheque that was issued in respect of the EPMI policies in support of his claim for brokerage commission. Although the cheque was signed by three signatories (Raihan, Phung and Ibrahim Ali, the chairman), it was not released to the plaintiff. The court's attention was drawn to the note to the effect that the cheque was not to be released unless 'MRS have signed the minutes'.

[23] The defendant offered RM200,000 to the plaintiff to settle all outstanding sums due and owing. The plaintiff did not agree with the figure but accepted the RM200,000 as part payment towards outstanding sums but not as full and final settlement. This sum has been taken into account by the plaintiff when filing this suit.

[24] The plaintiff called *Datin Seri Raihan Begum bt Abdul Rahman* ('PW2') in support of his case. She was the acting chief executive officer of the defendant in January 1998 until she left in June that same year. She testified that the claimant became a member of the council of business advisors ('CBA member') of the defendant. She enlightened the court that in the insurance business, there is a recognised group of people known as business introducers whose job is to look for clients seeking insurance coverage and to introduce them to insurance brokers. They assist the insurance brokers to secure the business and for this they are paid a commission known as an introducer fee at a rate of up to 30% of the brokerage fee. In the defendant, such a business introducer is known as a CBA member and his job is to secure the business in favour of the defendant. The client would purchase the insurance coverage from the defendant and in return, the CBA member will be paid a commission of 30% of the defendant's brokerage fee. Whilst it was possible to pay less than 30%, however it was not common to do so.

[25] PW2 told the court that the defendant appointed the plaintiff as a CBA member of the defendant. Although the appointment was agreed to in the board meeting on 28 October 1997, he admitted during

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cross-examination that the terms of the appointment were never put to the board. There was also no prior agreement with EPMI and MHS as to the percentage that would be paid to CBA members, however the usual rule was to pay up to a maximum of 30%. She agreed that there was nothing in black and white that the plaintiff was to be paid 30%.

[26] It is PW2's evidence that she prepared and signed the appointment letter (pp 62–63 of AB1) as she was told by the chairman, Encik Adam Ali Ibrahim, to attend to the management of the defendant since she was the next highest ranking executive after plaintiff's resignation. She admitted that the letter was not approved by the management and tabled before the board of directors but maintained that there was no need to do so as it was already agreed in the meeting that he was to be a CBA member. She further agreed that she signed the letter when she was a broker and not the acting chief executive officer of the defendant.

[27] PW2 testified that a letter of appointment had to be issued quickly to safeguard the defendant's interests. She was under the impression that they were under pressure to appoint the plaintiff otherwise he could take the clients elsewhere. When word got out that plaintiff had ceased to be the principal officer of the defendant, she received many calls of concern from clients introduced by the plaintiff expressing their concern over the departure of the plaintiff and enquiring whether their insurance policies with the defendant would be affected. Among those who called were Petronas, EPMI and MHS who were all major clients of the defendant introduced by the plaintiff. The defendant was afraid that with the departure of the plaintiff, it would lose both Petronas and EPMI as clients.

[28] As such, Petronas and EPMI were duly informed not only about the resignation of the plaintiff as the chief executive officer and principal officer of the defendant but also about his appointment as its CBA member. Reference was made to the minutes of a meeting ('P1') held with Petronas on 17 February 1998 which was attended both by herself and the chairman, Encik Adam Ali, on behalf of the defendant. It was during this meeting that the appointment of the plaintiff to sit on the council of business advisors to the defendant was announced. The purpose of the meeting was to pacify Petronas and EPMI that the defendant was appointing the plaintiff as a CBA member even though he had resigned as principal officer and that business was going to be as smooth as possible. PW2 also took steps to inform the foreign shareholders and directors about the plaintiff's appointment. There was no necessity to seek the consent or approval of Bank Negara for the appointment because Bank Negara had vide a circular dated 26 March 1997

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granted a blanket approval to all insurance brokers to appoint their own business introducers. The court notes that Circular JPI: 18/97 states that the blanket approval is:

> *tertakluk kepada svarat bahawa broker insurans tersebut pada setiap masa mematuhi* Garis Panduan perkongsian Brokeraj/Yuran Broker (Insurance Brokers' Brokerage/Fee Sharing Guidelines).

[29] PW2 testified that MHS purchased policies for 1998 and EPMI purchased policies for the years 1998–2001 and premiums were duly paid to the defendant. She agreed during cross-examination that in 1997, both EPMI and MHS were already clients of the defendant and that renewals were secured in 1997 when the plaintiff was still a director. The plaintiff was the key person in the team which negotiated with EPMI and MHS and in her opinion, the defendant could not have secured those two contracts without the plaintiff. Under the terms of his appointment, the plaintiff was to be paid 30% of the defendant's brokerage fees. A cheque for the introducer fee for the EPMI account for 1998 amounting to RM208,200 was in fact prepared and signed. However, En Adam Ali, the chairman of the board of directors, instructed the accounts department not to release the cheque until Morgan, Read & Sharman had signed the minutes of the board meeting. She questioned the instruction since Morgan, Read & Sharman had already indicated that the fees to the plaintiff should be paid. Between 24 February 1998 until June 1998, there was no attempt by the defendant to cancel the said cheque.

[30] PW2 testified that she attempted to resolve the issue about the payment to the plaintiff by writing to the chairman by putting on record her recommendations as to the need to pay the plaintiff in accordance with both defendant's and industry practice as well as in accordance with the terms of the plaintiff's appointment as CBA member.

[31] PW2 resigned from the defendant in June 1998. She did so because the defendant withdrew the application submitted to Bank Negara to confirm her as chief executive officer without her knowledge, thus causing her professional embarrassment since it created an impression that she was unfit for the position.

[32] The defendant called two witnesses. *Faris Alam Shah bin Idris Ahmad Shah* ('DW1') was the general manager of the defendant from 1 January 1998 until his retirement on 23 April 2005. He had been in the insurance industry since 1974 and claimed to know the plaintiff since the 1970s.

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[33] DW1 recited at quite some length his involvement in the insurance industry commencing from 1974 when he was an insurance accounts executive until he joined the defendant. The purpose of this recounting was obviously to establish the witness as a person who was familiar and experienced with the workings of the insurance industry.

[34] DW1 had no personal knowledge of the events and happenings in the defendant when the plaintiff was still with the company. He only joined the defendant in July 1998 and his evidence as to the events that occurred before that would be based on documentary evidence, primarily the minutes of the boards of directors' meetings of the defendant. His evidence re the later board meetings when he was present would only be in relation to events that occurred after the plaintiff had left. As such, the overall value of DW1 as a witness is questionable. A witness who was present during the time of the plaintiff's employment would be infinitely more valuable.

[35] Upon referring to the relevant documents, DW1 does not deny that the plaintiff was to be paid profit commission amounting to 10% of the defendant's pre-tax profit per year, subject to a maximum of RM250,000. According to him, payment of RM200,000 was made to the plaintiff vide two cheques of RM50,000 and RM150,000 and that this amount paid exceeded the 10% of the defendant's pre-tax profits for the years 1996 and 1997. There would appear to be some disparity between the calculations of the plaintiff as compared to that of the defendant in this respect. However, since both parties have agreed that the payment of the RM200,000 would resolve the issue about the non-payment of profit commission for the years 1996 and 1997, the court does not propose to belabor this point.

[36] In respect of the plaintiff's claim for salary for the years 1996 and 1997, DW1 was of the view that there was no agreement in the letter from Morgan, Read & Sharman Ltd (pp 1–2 of AB5) to pay remuneration. According to him, the letter merely constitutes a proposal as to remuneration. He testified that based on all the minutes of board of directors' meetings, he was unable to find any resolution to pay the plaintiff a sum of £4200 as monthly remuneration. He further testified that in his experience in the insurance industry, it was not a practice to pay directors or employees in English pounds.

[37] Reference was made to various board minutes, namely the minutes of the 38th board of directors' meeting held on 28 October 1997 which reflects that the issue about the remuneration to the CEO was discussed. It was recorded in the said minutes that:

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Encik Wan Othman requested the board to resolve on his remuneration by 31st December 1997. If the matter was not resolved by the said date, the board agreed to his request that he be reverted to the appointment of advisor in the business advisory council.

[38] DW1 attended the meeting, the 39th board meeting, held on 14 September 1998 (exh D2) on invitation as the general manager. The minutes of the said meeting would show that at least two of the board members of the previous meeting were present, namely the chairman Encik Adam Ali Ibrahim bin Md Ali and Abang Noordin bin Datuk Abang Hj Zainuddin. As recorded in the minutes, the board of directors approved, ratified and confirmed the resignation of the plaintiff as chief executive officer of the defendant with effect from 31 December 1997. Further the board resolved that the outstanding remuneration of the plaintiff for the years 1996 and 1997 in the sums of RM50,000 and RM150,000 respectively were approved. Although the words used in the minutes was 'remuneration', however it is clear that the amount of RM200,000 paid was in respect of profit commission.

[39] At the same meeting, the board also discussed the validity of the appointment of the plaintiff as a CBA member by Raihan and Phung. It claimed to have no knowledge of when the appointment letter was issued. DW1 testified that based on his 'studies and research', the normal practice of the company was that the chief executive officer would issue the letter of appointment after obtaining the approval of the entire board. DW1 further stated that it was the normal industry practice that a business introducer's appointment and remuneration could only be approved by the board of directors. However, in cross-examination, DW1 had to admit that nowhere was it recorded in the minutes of the 39th board meeting ('D2') that any part of the minutes of the 38th board meeting was incorrect and had to be corrected. In fact, according to him, the minutes of the 39th in fact confirmed the minutes of the 38th.

[40] DW1 also testified that based on the records of the company and the board minutes, neither Raihan nor Phung were appointed as chief executive officer of the defendant nor were they directors. However, during cross-examination, he admitted that there was also no board resolution in respect of his appointment as general manager. When it was put to him that his appointment as general manager was void because there was no board resolution to that effect, he surprisingly agreed. He was also questioned at quite some length as regards para 5.1 of the minutes of the 44th board meeting (D7) wherein it was recorded that he had informed the board that he had consulted with the lawyers on an alleged non-response of the plaintiff. Upon being referred to the plaintiff's letter dated 5 April 1999 to the

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defendant's former solicitors, Messrs Badrul Lee & Associates (p 3 of AB5), DW1 admitted that the contents of para 5.1 was incorrect.

[41] DW1 told the court that to his knowledge and based on the records of the defendant, the minutes did not reflect that Raihan and Phung were authorised to sign the plaintiff's letter of appointment as CBA member. According to DW2, the management must approve the terms of appointment which would be set out in a written agreement and thereafter the proposed agreement would have to be tabled before and approved at the meeting of the board of directors. It is only the chief executive officer who, after obtaining the consent of the board of directors, could issue and sign such a letter. He relied on industry practice as well as para 4(b) of the Bank Negara Insurance Brokers' Brokerage/Fee Sharing guidelines in support of his evidence.

[42] DW1 referred to the minutes of the 45th board meeting (D8) which he attended. In para 5.1, it is recorded that he had informed the board about the plaintiff's written request for his sub-brokerage fees for 1998, 1999 and 2000. The company's lawyers 'had opined that the company should not protract the issue' and had sent a letter to the plaintiff refuting his claim.

[43] DW1 also referred to various documents which showed that MHS had appointed the defendant as its placement broker from 1 January 1998. As for EPMI, the defendant was its placement broker from 1993–1997. Thereafter vide a letter dated 16 December 1997, EPMI accepted the defendant's renewal proposal for 1998–2000 (two years and one year extension).

[44] It is worth noting that towards the end of cross-examination, DW1 admitted that he was not the best witness for the defendant. He had no personal knowledge of all administrative matters prior to his joining the defendant and in fact no knowledge of anything that happened in the company before 1998. He agreed that one of the two persons who had attended both the 38th as well as the 39th board meeting should have been present in court in his stead.

[45] The defendant's second witness was *Seow Fei San* ('DW2'), the defendant's company secretary since 14 September 1998. Initially, she was employed by PFA Corporate Services Sdn Bhd, who was the secretarial agents of the defendant. She left PFA in October 2003 but continued to remain the company secretary of the defendant.

[46] As company secretary, DW2's duties would include attending board meetings and taking down and finalising board minutes. After taking down

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the notes, the draft of the notes would be sent to the chairman for comments. Once confirmed, the minutes would be distributed at the next board meeting for confirmation of the directors or amendment.

[47] DW2 produced the minutes of the 39th board meeting ('D4'), 40th board meeting (D3), 41st board meeting (D4), 42nd board meeting (D4), 42nd board meeting ('D5'), 43rd board meeting ('D6'), 44th board meeting (D7) and 45th board meeting (D8). She however admitted that she was not the company secretary who attended the 38th board meeting and thus would have no direct knowledge as to what had transpired during the said meeting.

EVALUATION AND FINDINGS

[48] In coming to a decision in this case, I have carefully considered the evidence adduced by witnesses for both parties in light of the documentary evidence tendered. Since the claim for profit commission is considered to be resolved with the payment of RM200,000 by the defendant to the plaintiff, the court is left with only two other issues to consider, namely the claim for outstanding monthly salary of £4,200 per month for 1996 and 1997 and the claim for brokerage commission amounting to USD17,708.06 and RM1,066,069.81. I will deal with each of the claims in turn.

Claim for outstanding monthly salary

[49] The plaintiff's claim for a monthly salary of £4,200 per month is based on his argument that since he worked for the defendant, he was entitled to some salary. He was paid only a small director's fee as a director and argues that he should be paid for all the work done.

[50] As to whether the plaintiff was an employee, the court finds that no contract of employment has been produced to establish that apart from being a director he was also employed under a contract of employment or the amount of salary payable to him under that contract.

[51] The court is in no doubt as to the plaintiff's position as a director as well as executive director of the defendant. This fact is well documented in the various minutes of board meetings and other correspondences. However, as far as the positions of chief executive officer and principal officer is concerned, the court finds that these are but different nomenclatures for the role that the plaintiff was performing in managing the affairs and business of the defendant at the material time. The fact that the plaintiff wore many hats, so to speak, does not mean that ipso facto he would also be entitled to many salaries for the different hats that he wore.

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[52] Assistance as to whether the plaintiff was entitled to be paid a salary can be gleaned from article 64 of the memorandum of association of Yuen Tah Traders Sdn Bhd (the old name for the defendant) which provides that the remuneration of the directors shall be determined by the company in general meeting. The plaintiff claimed that his remuneration was decided by the board members in 1997 but not during a board meeting. As such, there were no minutes of the determination which would have supported his contention.

[53] The plaintiff submits that the letter at p 1 of AB5 is evidence of the agreement to pay him a salary. Is this so? The court has carefully perused this letter signed jointly by FJ McCarthy and RJ Sharman dated 5 January 1998 after the plaintiff had already resigned and left the defendant. The court views it as an attempt to resolve the issue about the plaintiff's resignation. The second paragraph of this letter is pertinent and is reproduced below for ease of reference:

> I understand there is to be a Board Meeting on Thursday, an attempt to resolve the position. I believe there is an obvious resolution if the history of W.O.'s remuneration is considered. Up to the end of 1995 W.O. was paid £3,800 per month in respect of the Malaysian Helicopter Account plus 10% of the Malene profits. Therefore allowing an inflationary rise for 1996 he would have been paid £4,200 per month, however this would have created a loss in Malene's books and so no Profit Commission would be payable in 1996.
>
> As there was a loss in 1996 there would be no increase in 1997 and therefore W.O. continues to be paid at £4,200 per month. Then he will be due 10% of the 1997 profit less the loss now established for 1996 due to the incorporation of the new salary for W.O. in the 1998 figures (this is an established profit commission formula).

[54] The court is unable to find, after carefully examining the above letter, that it constitutes an agreement to pay the defendant £4,200 per month. At best, this is but an attempt by McCarthy and Sharman to resolve the impasse between the parties. They obviously thought very highly of the plaintiff's contributions to the defendant and had stated so in the letter. By suggesting the figure of £4,200 per month, they had hoped that the dispute could be resolved and the plaintiff would be able to remain with the defendant. The court's finding on this score is reinforced by the sentence 'I trust other directors and WO will agree *if you find this proposal acceptable*'. (Emphasis added.) The use of the words in bold would constitute proof that the figure of £4,200 per month was only a proposal.

[55] In coming to the conclusion that the plaintiff has not succeeded in proving on a balance of probabilities that there was an agreement to pay him £4,200 per month, the court is not unmindful of the plaintiff's evidence as

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to his efforts to turn the defendant into a profit making company. His evidence as to his sacrifices when the defendant was not making much money, how he was in charge of business development as well as the day to day running of the business — all on a small director's fee — has not been challenged. It is thus unfortunate that if there was indeed an agreement to pay him such or any sum as remuneration or salary, such agreement was not officially reduced into writing and confirmed by the board of directors. In the absence of any board resolution to pay him a salary of £4,200 per month and in the absence of any evidence or at all that he was ever paid in English pounds, the court finds that the plaintiff has failed to prove his claim for outstanding monthly salary of £4,200 per month.

Claim for brokerage commission

[56] The plaintiff's claim for brokerage commission stems from his appointment as a member of the Council of British Advisors or CBA member. The defendant disputes the appointment. As such, the first order of the day is to determine if the plaintiff was validly appointed as a CBA member.

[57] The evidence adduced would show that the plaintiff was appointed as a CBA member vide a letter dated 5 January 1998 (p 62 of AB1) signed by Raihan Abdul Rahman and Phung Yoke Boo. Various questions arise in relation to this letter of appointment. In considering whether it constitutes a valid letter of appointment, the court will consider the following secondary issues:

(a) whether the board of directors had agreed to the appointment of the plaintiff as a CBA member;

(b) whether Raihan Abdul Rahman and Phung Yoke Boo, in their designations as brokers, were fit and proper persons to sign the letter of appointment; and

(c) If the answers to (a) and (b) are both in the affirmative, whether the plaintiff was entitled to receive the sums of USD17,708.06 and RM33,269.81 in respect of the MHS account and RM832,800 in respect of the Esso account.

[58] The plaintiff argues that at the 38th board of directors' meeting, agreement was reached that he would be appointed advisor in the business advisory council. It cannot be denied that the minutes of the said board meeting show that 'the board agreed to his request that he be reverted to the appointment of advisor in the business advisory council'. The court finds that the above minutes as recorded does convey the meaning that the board had in fact agreed that the plaintiff would indeed be appointed as an advisor if the

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issue about his remuneration was not resolved by 31 December 1997. An appointment as advisor in the business advisory council is the same as an appointment as a CBA member.

[59] There is an interesting development when it appears that there was no confirmation of the minutes of the 38th board meeting. From what is recorded in para 1, a 38th board of directors' meeting took place on 12 January 1998 but without the requisite quorum. Thus the issues discussed at that meeting 'could not be considered as business transacted' and accordingly there was no confirmation of the minutes of the previous board meeting. It is unfortunate that the minutes of the impugned meeting held on 12 January 1998 is not before the court. However, be that as it may, the minutes of the 38th board meeting have, officially, not been confirmed.

[60] On the issue of whether Raihan Abdul Rahman and Phung Yoke Boo were authorised to sign the letter appointing the plaintiff as CBA member, the court has considered the inescapable fact that at the material time, both Raihan and Phung were only brokers and they signed as brokers. Below their names and signatures are the words 'broker'. It is also an undisputed fact that at the material time, Raihan Abdul Rahman had yet to be appointed as the acting chief executive officer of the defendant.

[61] Raihan Abdul Rahman may well be the most senior or next highest ranking officer in the defendant after the plaintif's resignation. The court notes her evidence that she was told by the chairman, Encik Adam Ali Ibrahim, to attend to the management of the defendant. Be that as it may, the question that arises for consideration is whether Raihan or, for that matter, Raihan and Phung were authorised to sign the letter of appointment.

[62] In considering this issue, the court has had regard to the Insurance Brokers' Brokerage/Fee Sharing Guidelines and more specifically to guideline 4(b) which states that:

> An arrangement for sharing of brokerage/fee must be in a written form of agreement and duly approved by the management and subsequently tabled and approved/duly noted by the broker's board of directors.

Although the plaintiff's letter of appointment issued by Raihan and Phung was in written form setting out the arrangement for the sharing of brokerage fees, it is indeed unfortunate that the said arrangement was neither tabled nor confirmed by the defendant's board of directors. Raihan, when asked, admitted that it was not approved by the management nor tabled before the board of directors. Although she offered the explanation that there was no need to do so as there was a prior agreement during the board meeting that plaintiff was to be a CBA member, the court finds this argument to be

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unconvincing. In light of the fact that Raihan was at the material time only a broker, albeit the highest ranking executive, it is questionable whether she had the locus to sign the plaintiff's appointment letter. Even if she was of the view that she was the most appropriate person to sign the letter, she should have escalated it to the board of directors at the earliest opportunity for confirmation and ratification of her actions. Admittedly, she did not do so.

[63] The court has also pondered whether the requirement to table the arrangement could be deemed to have been complied with since the 38th board meeting had allegedly agreed to the plaintiff's appointment. However, the court finds that since the minutes of the 38th board meeting is itself questionable, the answer above has to be answered in the negative.

[64] In light of the fact that the court has found that Raihan and Phung were not fit and proper persons to sign the letter of appointment, it is unnecessary for the court to consider whether the plaintiff has successfully proven, on a balance of probability, that he was entitled to be paid the sums of USD17,708.06, RM33,269.81 and RM832,800 as brokerage commission. However, the court will state here that even if Raihan and Phung were authorised to sign the letter of appointment, it would still have been questionable whether the plaintiff would be entitled to be paid brokerage commission for the EPMI and MHS accounts since both those contracts/renewals were obtained by the plaintiff when he was still a director of the defendant. It is irrelevant that the policies would only be effective from a date when the plaintiff was no longer a director in the defendant.

[65] In conclusion, the court finds that based on the totality of the evidence adduced that the plaintiff has failed to make out a case against the defendant for the outstanding salary as well as the brokerage commission.

[66] However, in so finding, the court will also state here that the plaintiff in this case appears to have been hard done by. He had from the initial life of the defendant done much to help set it up. He had worked tirelessly to establish the business of the defendant and to change it from a loss-making to a profit-making concern. When money was in short supply, he carried out many roles, including the tasks of the departed technical advisor, without thought of remuneration. When business improved, he was acknowledged with a profit commission. When business slumped again, and his profit commission was no longer commensurate with his many and varied duties, it was then that the issue about a salary or remuneration came into play. Unfortunately, this issue about a salary and its quantum was not resolved even after two years. It was then when the plaintiff decided to leave the defendant that the next issue about his appointment as a CBA member came up. Raihan Abdul Rahman, in her eagerness to allay any possibility of the defendant

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losing clients as a result of the plaintiff's resignation, took immediate steps to appoint the plaintiff as a CBA member when she herself had yet to be appointed as acting chief executive officer. She made the further error in failing to get the board to ratify her action. By so doing, she rendered the plaintiff's appointment untenable in law. As for the defendant, it had benefitted from the plaintiff's contributions over the years as well as the clients that he had brought into the company. The defendant, through Raihan, had also made announcements to all and sundry about the plaintiff's appointment as CBA member, thus reaping the benefits of their continued association with him. Even if the plaintiff's appointment was irregular, the defendant should have seen their way to ensuring that the plaintiff did not lose out, even if payment has to be made on an ex gratia basis. However, that is a matter that is entirely up to the defendant to decide.

[67] The claimant's case is hereby dismissed with costs.

Plaintiff's claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed